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UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Order 2000-9-14

Served: September 18, 2000

Issued by the Department of Transportation  
on the 14th day of September, 2000

Joint Application of

NORTHWEST AIRLINES, INC. and  
JAPAN AIRLINES, CO., LTD.

for statements of authorization under 14 CFR  
Part 212 (reciprocal U.S.-Japan all-cargo code  
sharing/blocked space)

Docket OST-2000-7617-9

## ORDER

### SUMMARY

By this order, we have decided to grant authority to Northwest Airlines and Japan Airlines (JAL) to provide code-share and blocked-space service on their respective all-cargo services between any point or points in the United States and any point or points in Japan via intermediate points. The authority is granted for an indefinite duration.

### BACKGROUND

On January 30, 1998, the United States and Japan agreed to authorize various new services between the United States and Japan (1998 Agreement).<sup>1</sup> Among other things, the 1998 Agreement provides that the U.S. and Japanese designated airlines may code share with each other in the U.S.-Japan market. In addition, "incumbent" carriers may operate services between any points in the United States and any points in Japan, and beyond. Under the terms of the 1998 Agreement, Northwest and JAL are both "incumbent" carriers.

### APPLICATION

<sup>1</sup> The agreement reached in January formally became effective by an exchange of notes dated April 20, 1998.

Northwest and JAL jointly request statements of authorization to enable them to operate reciprocal code share and block space services on their all-cargo flights between the United States and Japan via intermediate points.<sup>2</sup> The carriers further request that the authority be granted for an indefinite duration.

In support of their application, the Joint Applicants state that their proposed code-share authority is consistent with the U.S.-Japan aviation agreement; that the Department had previously approved a similar all-cargo code-share arrangement between Northwest and another Japanese carrier but that the carriers have now decided to terminate that agreement;<sup>3</sup> and that the Northwest-JAL arrangement is consistent with the public interest because it will promote competition by increasing their joint frequencies, promoting more efficient use of their capacity and providing more options for shippers.

## RESPONSIVE PLEADINGS

Polar Air Cargo filed an answer to the joint application of Northwest and JAL. The applicants and United Parcel Service (UPS) filed replies. The applicants, Polar, and United Air Lines filed responses.<sup>4</sup>

Polar states that the code-share agreement should be denied because it is harmful to competition since Northwest and JAL dominate the U.S.-Japan freight market and they both serve Tokyo's Narita Airport, the most important Japanese gateway. Polar states that Narita is a slot restricted airport where the applicants hold numerous slots while Polar holds too few to compete against larger carriers. In addition, it states that Japan is not an open-entry country and that the proposed arrangement thus raises similar concerns to those the Department found in other countries where it determined market forces could not prevent such code-share arrangements from foreclosing competition. Polar also states that the arrangement will not provide significant public benefits since the Joint Applicants operate overlapping services. Lastly, if the Department should approve this arrangement, Polar argues that the Department should impose conditions to protect competition, including a requirement that Northwest and JAL transfer peak-hour slots at Narita to enable other carriers, including Polar, to offer competitive freight service.

The Joint Applicants state that their code-share proposal is consistent with the recently amended U.S.-Japan aviation agreement that liberalized the aviation regime and introduced code-share cooperation to secure carrier efficiencies and consumer benefits. They state that several similar code-share arrangements have been approved without controversy and that Northwest and JAL will continue to compete with each other. The Joint Applicants state that the U.S.-Narita cargo

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<sup>2</sup> Both Northwest and JAL hold the necessary underlying authority to provide this code-share service between the United States and Japan. Northwest holds certificate authority by Order 98-6-22, and JAL holds permit authority by Order 98-4-17.

<sup>3</sup> See Joint Statement of Authorization (December 18, 1998, corrected January 26, 1999) that approved a code-share agreement between Northwest and Nippon Cargo Airlines. By a letter dated July 6, 2000, the carriers advised the Department that they plan to terminate their arrangement, effective August 31, 2000.

<sup>4</sup> All the replies and responses were accompanied by motions for leave to file otherwise unauthorized documents. In the interest of a complete record, we will grant the motions.

market is very competitive with seven carriers providing all-cargo service. Lastly, the Joint Applicants states that they do not hold an excessive number of all-cargo slots compared to Polar, which is a new entrant.

Polar responds that the Joint Applicants did not demonstrate any significant public benefits to offset the competitive concerns of their arrangement. It states that the public would be better served by competitive service by other carriers instead of enhancing the dominant market positions of the Joint Applicants.

UPS states that it does not oppose the Northwest-JAL arrangement. It comments, however, that the Department should secure additional all-cargo access for U.S. carriers at Narita, especially for carriers, such as UPS, that have not been awarded many slots. It further states that if the Department reviews the current allocation of slots, it should review the slot allocations to all carriers to determine how the slots should be redistributed.

United takes no position on the Northwest-JAL code-share arrangement. It does, however, oppose UPS' suggestion that the Department should reallocate Narita slots, which it argues is beyond the scope of this proceeding.

## DECISION

We have decided to grant the application of Northwest and JAL to engage in reciprocal code-share service for their all-cargo operations between the United States and Japan via intermediate points. We will grant this authority for an indefinite term, subject to our standard conditions.

The Department regulates code-share arrangements under Part 212 of its regulations. Under these rules, the Department will issue a statement of authorization to the extent consistent with the applicant's underlying economic authority, if the proposed arrangement is in the public interest. In determining the public interest, we consider among other things, the extent to which the authority requested is consistent with the applicable aviation agreement and the benefits to the U.S. passengers and shippers under the proposed arrangement.

Upon consideration of all the factors in this case, we find that the proposed Northwest-JAL code-share services meet these standards and are in the public interest.

The 1998 Agreement liberalized our aviation relations with Japan to, among other things, expressly permit code-share service for the first time in the U.S.-Japan market. A number of carriers have taken advantage of these new rights and entered into code-share arrangements to reap the benefits of this new regime.<sup>5</sup> The proposed Northwest-JAL services are consistent with the 1998 Agreement and will ensure the greater use of these valuable opportunities.

Furthermore, we find that the proposed services will provide important service benefits to shippers. The record affirmatively shows that the Northwest-JAL arrangement, in addition to

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<sup>5</sup> These include United Air Lines and All Nippon Airways, American Airlines and JAL, Northwest and Nippon Cargo Airlines and UPS and Nippon Cargo Airlines.

maximizing use of our bilateral rights, will offer shippers enhanced public benefits in the form of more thorough schedule coverage, faster transit times, and greater protection from service failure.<sup>6</sup>

We have reviewed the arguments offered by Polar against approval but have not found them persuasive. Polar essentially points to the combined number of weekly slots held by the joint applicants at Tokyo's Narita Airport as evidence that the carriers could exercise market dominance, and it asserts that approval of their code-share request accordingly would produce anticompetitive results. Polar also cites certain past Department cases involving alliances or code sharing (American Airlines-British Airways and American Airlines-TACA) where we voiced certain competitive concerns, and it argues that those cases call for disapproval here, or at least for the imposition of protective conditions on any approval.

While a competitive analysis is certainly germane to consideration of the Northwest-JAL request, the basis for Polar's analysis is too narrow, overlooking certain other elements that we regard as more instructive in the circumstances presented. For example, the record indicates that seven freighter operators currently provide service in the U.S.-Narita cargo market. Also, based on the Department's T-100 data for the year ended September 1999, Northwest and JAL had a combined market share in the U.S.-Japan cargo market of only 37 percent. This compares with market shares of nearly 13 percent for FedEx, 9.5 percent for NCA, 8 percent for United, and nearly 8 percent for UPS, thereby showing a significant competitive presence of other carriers in the market. Finally, we note that the Department of Justice, which specifically reviewed the proposed Northwest-JAL transaction on competition grounds, elected not to challenge or delay it.<sup>7</sup> Against this background, we do not find a basis either to disapprove or condition the joint Northwest-JAL application.<sup>8</sup>

#### ACCORDINGLY,

1. We grant Northwest Airlines a statement of authorization to display Japan Airlines' "JL" designator code on all-cargo flights operated by Northwest Airlines between a point or points in the United States and a point or points in Japan via an intermediate point or points in third countries;
2. We grant Japan Airlines a statement of authorization to display Northwest Airlines' "NW" designator code on all-cargo flights operated by Japan Air Lines between a point or points in the United States and a point or points in Japan via an intermediate point or points in third countries;

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<sup>6</sup> See Northwest reply dated August 1, 2000, at 2.

<sup>7</sup> Polar in its competitive analysis also cited statements we had made in Order 99-5-2 about the absence of completely open skies in the U.S.-Japan market as a factor justifying the imposition of certain protective conditions. However, by Order 99-8-14, we reexamined market conditions and determined that they did not warrant these conditions.

<sup>8</sup> Since we have decided not to impose any special conditions regarding slot allocation as requested by Polar, the concerns of UPS and United are now moot.

3. The authority granted in ordering paragraphs 1 and 2 is effective immediately and will remain in effect indefinitely, subject to the attached conditions;
4. We may amend, modify, or revoke the authority granted by this order at any time in our discretion without notice or hearing;
5. We grant the motions of Northwest Airlines and Japan Airlines, Polar Air Cargo, United Parcel Service and United Air Lines for leave to file otherwise unauthorized documents;
6. We will serve this order on Northwest Airlines, Japan Airlines, Polar Air Cargo, United Parcel Service, United Air Lines, the Ambassador of Japan in Washington, D.C.; the U.S. Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration (AFS-220).

By:

**SUSAN MCDERMOTT**  
Deputy Assistant Secretary for  
Aviation and International Affairs

(SEAL)

### Conditions

The statements of authorization granted to Northwest and Japan Airlines are subject to the following conditions:

(a) The statements of authorization will remain in effect as long as (i) Northwest Airlines and Japan Airlines continue to hold the necessary underlying authority to operate the code-share services at issue, and (ii) the code-share agreement providing for the code-share operations remains in effect.<sup>1</sup>

(b) Northwest Airlines and/or Japan Airlines must notify the Department no later than 30 days before they begin any new code-share service under the code-share services authorized here. Such notice shall identify the market(s) to be served, which carrier will be operating the aircraft in the code-share market added, and the date on which the service will begin. Such notices should be filed in Docket OST-2000-7617.

(c) Northwest Airlines and/or Japan Airlines must promptly notify the Department if the code-share agreement providing for the code-share operations is no longer effective or if the carriers decide to cease operating all or a portion of the approved code-share services.<sup>2</sup> Such notices should be filed in Docket OST-2000-7617.

(d) The code-sharing operations conducted under this authority must comply with the Department's regulations concerning code-share arrangements. Notwithstanding any provisions in the contract between the carriers, our approval here is expressly conditioned upon the requirements that the subject foreign air transportation be sold in the name of the carrier holding out such service in computer reservation systems and elsewhere; and that the carrier selling such transportation (i.e., the carrier shown on the waybill) accept responsibility for the entirety of the code share journey for all obligations established in its contract of carriage with the shipper. Further, the operating carrier shall not permit the code of its U.S. air carrier code-sharing partner to be carried on any flight that enters, departs or transits the airspace of any area for whose airspace the Federal Aviation Administration has issued a flight prohibition.

(e) The authority granted to operate to third countries is subject to the condition that any service provided shall be consistent with all applicable agreements between the United States and Japan, and all agreements with other foreign countries involved. Furthermore, (a) nothing in the award of this blanket statement of authorization should be construed as conferring upon Northwest rights (including code-share, fifth-freedom intermediate and/or beyond rights) to serve markets where U.S. carrier rights are limited unless Northwest notifies us of its intent to serve such market and unless and until the Department has completed any necessary carrier selection procedures to determine which carrier(s) should be authorized to exercise such rights;<sup>3</sup> and (b) should there be a request by any carrier to use the limited-entry route rights that are included in Northwest's authority by virtue of the blanket statement of authorization granted here, but that are not then being used by Northwest, the holding of such authority will not be considered as providing any preference for Northwest in a competitive carrier selection proceeding to determine which carrier(s) should be entitled to use the authority at issue.

(f) The authority granted here is specifically conditioned so that neither Northwest Airlines nor Japan Airlines shall give any force or effect to any contractual provisions between themselves that are contrary to these conditions.

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<sup>1</sup> We note that the code-share agreement as submitted did not include provisions regarding exclusive dealings between the code-share parties. Should the parties subsequently decide to amend their code-share agreement to include any provision relating to an exclusive arrangement between the parties, that amended language must first be submitted for consideration by the Department.

<sup>2</sup> We expect this notification to be received within 10 days of such non-effectiveness or of such decision.

<sup>3</sup> The notice referenced in condition (b) above may be used for this notification.